Supreme Court of the United States

OCTOBER TERM, 1936.

No. 285.

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

AND

PETITION FOR REHEARING.

H. C. KILPATRICK,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 285.

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME.

May It Please the Court:

Your petitioner, United States, ex relatione Girard Trust Company, as trustee under the will of John A. Brown, Jr., deceased, respectfully presents this, its motion for leave to file, out of time, the annexed petition for rehearing, on its petition for a writ of certiorari in this Honorable Court in the above entitled cause, and, in support thereof, presents the following:

The petition for certiorari herein was denied by this Honorable Court on December 7, 1936, so that the time for filing petition for rehearing, as prescribed by Rule 33 of this Honorable Court, expired on January 1, 1937.

Since that time, namely, on February 4, 1937, the United States Circuit Court of Appeals for the Third Circuit rendered its decision in the case of *United States of America v. Arthur S. Arnold, et al., Surviving Trustees of the Estate of Samuel F. Nirdlinger, Deceased*, No. 5777, October Term,

1935 (not yet officially reported; copy of the opinion is printed as Appendix A to the annexed petition for rehearing). The decision of said court is in conflict with the decision of the United States Court of Appeals for the District of Columbia in the instant case, as more clearly appears from the annexed petition.

There are pending in District Courts within the Third Circuit numerous suits for refund of income taxes[1] involving the same question decided in the *Arnold* case and in the instant case, and it is reasonable to assume that the government will seek review of that question by this Honorable Court, either in the *Arnold* case or in some other similar case from that Circuit, in order that the conflict in question may be settled. Should this Honorable Court then approve the view of the Circuit Court of Appeals for the Third Circuit, grave injustice will result to the relator herein if this motion be denied.

WHEREFORE, your petitioner respectfully moves the Court for leave to file the annexed petition for rehearing on its petition for certiorari to the United States Court of Appeals for the District of Columbia out of time.

GIRARD TRUST COMPANY, Trustee Under
The Will of John A. Brown, Jr.,
Deceased

By its Attorney:

H. C. KILPATRICK.

CERTIFICATE OF COUNSEL.

I, H. C. KILPATRICK, counsel for the above named petitioner, do hereby certify that the foregoing motion for leave to file petition for rehearing out of time is presented in good faith and not for delay.

H. C. KILPATRICK,
Counsel for Petitioner.

[1] See Appendix B to annexed petition for rehearing.

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 285.

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REHEARING.

Comes now the above-named petitioner, and by leave of court first had and obtained, presents this its petition for a rehearing of the petition for certiorari in the above entitled cause and, in support thereof, respectfully shows:

I.

Since the Denial of the Petition for Certiorari Herein, the United States Circuit Court of Appeals for the Third Circuit Has Rendered a Decision in Conflict With the Decision of the United States Court of Appeals for the District of Columbia in the Instant Case.

The petition for certiorari herein was denied on December 7, 1936.

On February 4, 1937, the United States Circuit Court of Appeals for the Third Circuit rendered its decision and promulgated its opinion in the case of *United States of America* v. *Arthur S. Arnold, et al., Surviving Trustees of the Estate of Samual F. Nirdlinger, Deceased*, No. 5777, October Term, 1935. That opinion has not yet been officially reported, but a copy thereof is attached to this petition as

Exhibit A. The decision in that case is clearly in conflict with the decision below in the instant case.

In the instant case the Commissioner of Internal Revenue refused to refund to a testamentary trustee income taxes illegally collected from it. His refusal was based upon the fact that an individual beneficiary of the trust had obtained erroneous refunds of income taxes for some years and had failed to pay income taxes due for other years, which refunds and unpaid taxes in the aggregate exceeded the amount due the trustee, but which were barred from recovery by the government under the applicable statutes of limitation. The trustee, relator herein, sought by mandamus[1] to compel refund to it of the amounts admittedly overpaid by it. The Commissioner defended on the ground that, by reason of the facts aforesaid, he should not "in equity and good conscience • • • be commanded and directed to refund" the amounts otherwise due the trustee (R. 25). The Court of Appeals for the District sustained this defense, holding that, although petitioner undoubtedly had a legal right to the refund demanded, it would be inequitable to enforce that right. *85 F. (2d) 230, 234.* In so deciding, the court followed and cited with approval the decision of the Circuit Court of Appeals for the First Circuit in *White* v. *Stone,* 78 F. (2d) 136[2] saying that, "except for procedural differences" the cases were identical, and that "we can think of no reason why the same rule should not apply here."

In the *Arnold* case, *supra,* testamentary trustees erroneously reported certain income as taxable to the trust, whereas such income was properly taxable to the beneficiaries of the trust. In a suit by the trustees for refund of the taxes erroneously paid by them, the United States con-

---

[1] The Court of Appeals held mandamus to be the appropriate remedy since the fact and amount of the overpayment had been determined by final decision of the Board of Tax Appeals.

[2] We understand that a petition for rehearing is also being filed with this court in *Stone* v. *White, supra,* (No. 202, October Term, 1935, in this Court), based upon the conflict arising from the decision in the *Arnold* case.

tended that "it would be inequitable to allow recovery" because the bar of the statute of limitations prevented collection of taxes from the beneficiaries who should have paid it in the first instance. This defense was expressly rejected by the Court (see Appendix A).

In neither the *Arnold* case nor the instant case was the Commissioner's failure to proceed against the beneficiary attributable to any act or omission of either the trustee or the beneficiary. In each case the commissioner of Internal Revenue was put on notice by the trustee of its denial of tax liability long before the government was barred from proceeding against the beneficiary. Cf. *Hulburd v. Commissioner*, 296 U. S. 300, 303-4.

The direct conflict between the two decisions is apparent, and it is therefore respectfully submitted that this Court should vacate the order denying the petition for certiorari herein, and grant said petition, in order that the conflict in question may be settled.

II.

It is Important that this Conflict Be Settled Promptly, Because of the Large Number of Cases Now Pending in Which the Same Question is Involved.

While petitioner is not informed as to whether the government will petition for certiorari in the *Arnold* case, it is reasonable to believe that that decision will be followed in numerous other cases now pending in the District Courts within the Third Circuit.[3] It seems inevitable, therefore, that the question eventually will reach this Court. Should the view of the Circuit Court of Appeals for the Third Circuit then be adopted by this Court, injustice would result to the relator if it alone were not given the benefit of such decision.

Since the *Arnold* decision was announced, there was de-

[3] For a partial list of such cases—as well as similar cases pending in other Federal Courts throughout the country—see Appendix B attached hereto.

cided on February 9, 1937, by the United States District Court for the Western District of Pennsylvania the case of *Union Trust Company, Trustee,* v. *United States,* Law No. 7862, wherein the plaintiff, a trustee, had been required to pay a tax upon income which properly should have been taxed to a beneficiary of the trust, and in a timely suit for refund, the government defended on the ground that it was then too late to assess and collect the tax from the beneficiary and that, therefore, it would be inequitable to allow the refund to the trustee. This defense was held invalid, the court saying:

> "The court feels that it is controlled in its decision by the case of UNITED STATES v. ARNOLD, No. 5777 October Term, 1935, 3rd C. C. A., filed February 4, 1937. The Circuit Court of Appeals for this Circuit, in that case held that the Trustees should recover the taxes paid by them, and overruled the government's recoupment defense. The facts in UNITED STATES v. ARNOLD are essentially parallel to those of the instant case. In each case the demand for refund had been made by the Trustee prior to the expiration of the limitation period for assessment against the beneficiary.
>
> "In the light of the judgment of the Circuit Court of Appeals, supra, this court revises its conclusions previously reached, and will order judgment in favor of the plaintiff."

As will be seen from the list of cases appearing in Appendix B, there are at least forty-two similar cases pending in the two Pennsylvania District Courts, in which it is reasonable to suppose that the *Arnold* decision will be followed, and not the decision below in the instant case, or the decision in *White* v. *Stone, supra.* It is respectfully submitted, therefore, that a prompt settlement of the conflict is desirable to avoid confusion as to the applicable rule of law in a large group of cases now actually pending.

WHEREFORE, your petitioner prays that this Court vacate its order of December 7, 1936, denying the petition for

certiorari herein, and rehear petitioner's petition for certiorari; and that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6618, October Term, 1935, *United States, Ex Relatione Girard Trust Company, Trustee Under the Will of John A. Brown, Jr., Deceased, Appellant*, v. *Guy T. Helvering, Commissioner of Internal Revenue, Appellee*, and that the said judgment may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

GIRARD TRUST COMPANY, Trustee
Under the Will of John A.
Brown, Jr., Deceased,

By H. C. KILPATRICK,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I, H. C. Kilpatrick, counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

H. C. KILPATRICK,
Counsel for Petitioner.

APPENDIX A.

In the United States Circuit Court of Appeals
For the Third Circuit.

No. 5777. October Term, 1935.

UNITED STATES OF AMERICA, *Defendant-Appellant*,

v.

ARTHUR S. ARNOLD and THE REAL ESTATE LAND TITLE AND TRUST COMPANY, Surviving Trustees of the Estate of Samuel F. Nirdlinger, Deceased, *Plaintiffs-Appellees*.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

OPINION.

(Filed February 4, 1937)

Before Davis and Thompson, Circuit Judges, and Forman, District Judge.

Davis, Circuit Judge.

This is an appeal from a judgment of the District Court allowing recovery of an overpayment of income tax by the trustees.

In 1928 the trustees sold some of the assets of the Nirdlinger Estate and reported a profit of $169,656.51 on which they paid the income tax for that year. When their account was filed with the Orphans Court of Philadelphia County in 1932, it decreed that $23,805.23 of the profit resulting

from the sale did not belong to the estate, but to the life tenants or beneficiaries and was "currently" distributable to them.

Accordingly the tax thereon should have been paid by the beneficiaries and not by the trustees for the estate. Seasonable demand for the return of the overpayment was made and refused and suit was brought to recover it.

Income "currently" distributable to a beneficiary is, within the meaning of taxing statutes, income of the beneficiary as of the time of its receipt by the fiduciary and is returnable by and taxable to the beneficiary, whether or not distributed to him. *McCaughn* v. *Girard Trust Co.*, 19 Fed. (2d) 218; *Freuler* v. *Helvering*, 291 U. S. 35. Consequently the income of $23,805.23 distributable in 1928 to the beneficiaries but retained for some time by the trustees was income of, and taxable to, the beneficiaries.

But the government says that it would be inequitable to allow the trustees to recover for the reason that the statute of limitations has run and it cannot recover from the beneficiaries. Therefore, it says, the trustees are estopped. But the trustees made demand for the return of the overpayment and this was refused by the Commissioner before the statute had run. Estoppel, however, as Judge Dickinson, in the following quotation well said, in disposing of this case, is not a defense to this action:

> "The final refuge of the defense is in the estoppel set up. Estoppel is an equitable doctrine. Here the right of action is a legal right and indeed a statutory one. It may be that the right should not have been given under conditions, such as here, where the giving of it enables the beneficiary to escape payment of a tax which he otherwise should pay but this does not affect the question of whether it was given. It is agreed all around that a tax might have been assessed against the beneficiaries. The neglect or refusal to so assess it would not make the Estate or any one else taxable who otherwise would not be. We do not see that a mistake of judgment or any cause or reason for the failure to tax

one affects the legal rights of others. The distinction between Law and Equity is illustrated by that between Laches and a Statute of Limitations. They are founded on the like considerations. Equity however, denies a remedy when under all the circumstances the complainant has forfeited his right to it. The law applies only the calendar test. Is the plaintiff within the time allowed him? A Statute of Limitations may be tolled when in good faith it should not be invoked but no equitable considerations will deny to a plaintiff his legal rights by shortening the period of limitation allowed by law. Had the plaintiffs failed to bring the present action within the statutory time limit no excuse for the delay based upon hard luck considerations would avail them because the right they are seeking to assert is a legal right. By the same token a legal right bestowed is not lost by like considerations. We refrain from discussing the doctrine of estoppel because it has no place in the discussion of a legal right."

The judgment is affirmed.

APPENDIX B.

The following cases, all of which involve the same general question as that decided in *White* v. *Stone*, 78 F. (2d) 136, and in *United States* v. *Arnold, et al.*, (Appendix A, *supra*), are now pending in the courts indicated. Doubtless, there are many others of which petitioner has no knowledge:

1. In the United States District Court of the Eastern District of Pennsylvania.

Plaintiff's Name	Number	Amount
Cadwalader, Jr., et al.	17346	$3,000.00
The Pennsylvania Co. for Insurance, etc., et al.	18208	7,000.00
The Pennsylvania Co. for Insurance, etc., et al.	18222	700.00

Plaintiff's Name	Number	Amount
Provident Trust Co., et al.	18078	28,000.00
Provident Trust Co., et al.	18396	4,352.38
Provident Trust Co., et al.	18404	1,348.24
Packard, et al., Exrs. and Trs.	17590	15,000.00
Smith, et al., Exrs. and Trs.	17030	11,000.00
Lear, et al., Exrs. and Trs.	18206	2,000.00
Gillett, et al., Trs.	18630	2,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18096	5,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18098	800.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18322	200.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18410	400.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18186	3,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18100	4,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18408	3,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18324	300.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18102	29,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18326	1,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18104	200.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18106	300.00
Fidelity-Philadelphia Trust Co., et al., Trs.	18108	1,000.00
Fidelity-Philadelphia Trust Co., et al., Trs.	19170	2,510.49
Fidelity-Philadelphia Trust Co., et al., Trs.	19198	8,049.37
Fidelity-Philadelphia Trust Co., et al., Trs.	19196	2,144.44
Fidelity-Philadelphia Trust Co., et al., Trs.	19356	5,317.00

Plaintiff's Name	Number	Amount
Fidelity-Philadelphia Trust Co., et al., Trs.	19310	391.25
Girard Trust Co., et al., Trs.	18138	600.00
Girard Trust Co., et al., Trs.	19480	1,542.27
Girard Trust Co., et al., Trs.	19484	540.38
Girard Trust Co., et al., Trs.	19482	827.42
Girard Trust Co., et al., Trs.	19492	9,785.06
Girard Trust Co., et al., Trs.	19486	240.50
Trustees Estate of Sydney Wright	18232	1,000.00
Executors Estate of John P. Crozer	18654	17,000.00
Trustees Estate of John P. Crozer	18656	4,000.00
Pennsylvania Company, et al., Trs.	18260	500.00
Pennsylvania Company, et al., Trs.	18334	500.00
Pennsylvania Company, et al., Trs.	18430	300.00
2. In the United States District Court for the Western District of Pennsylvania.		
*The Union Trust Company of Pittsburgh, Trustee	7862	$84,000.00
Fidelity Trust Company, et al., Trustees	7959	2,000.00
3. In the United States District Court for the Northern District of Illinois, Eastern Division.		
First National Bank of Chicago, Trustee	43595	
First National Bank of Chicago, Trustee	43954	
The Northern Trust Company, Trustee	44015	
Chicago Title & Trust Company, Trustee	43610	2,000.00
4. In the United States Circuit Court of Appeals for the First Circuit.		
Stone v. White	**	43,000.00
Stone v. White	**	30,000.00
5. In the United States Circuit Court of Appeals for the Fifth Circuit.		
***First National Bank of Birmingham, et al., Trustees	4466	

* Decided February 9, 1937. See petition for rehearing, *supra*, p. 6.

** Decided U. S. District Court March 1, 1935, in favor of plaintiffs; appealed to Circuit Court of Appeals, First Circuit, by defendant (collector); on stipulation, printing of record postponed until final disposition of *Stone* v. *White*, No. 202, October Term 1935, of this Court.

*** On appeal from decision reported in 12 Fed. Supp. 301.